RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

ABELL, ADM'R. OF GILBERT, *v.* HOWE ET AL.

Where a bequest is made in a will *in trust* in the executor, and an administrator *de bonis non* wrongfully perverts the trust funds and is removed by the probate court (never having given bonds as trustee and never having rendered an account to the probate court as administrator), and a successor is appointed, the latter may invoke a court of equity to reach the funds and bring them to the use provided in the will.

Where a purchaser of trust property has notice of the trust, before the money to the full value of the property is paid over and is beyond his power to reach, he cannot be regarded as an innocent *bonâ fide* purchaser.

Where an attorney has notice of a trust, the law will presume the notice was communicated to the client, and if this knowledge comes to the attorney or agent while acting in another and different transaction, the client and principal will be affected with notice.

Therefore where such recusant administrator invested such trust funds in a house and lot, taking the title to himself without mentioning the trust, and his creditor attached the same but abandoned the suit upon the debtor's conveying the same to the creditor's attorney with directions to pay the creditor his debt out of the avails, and the attorney knowing of the trust when he took the title holds the avails claiming that he should first pay said debt out of them, it was *held* that the creditor was not an innocent purchaser for value, and that had he entered his suit and obtained judgment and had the premises set off on execution he would have obtained no title because his creditor had none in equity, and in a suit in chancery in favor of the present administrator against such recusant administrator, creditor and attorney, a decree was made for the orator against all the defendants for the amount of the money in the attorney's hands, received from the sale of the premises, which he holds for the benefit of the creditor, and to the amount of his debt, and against the executor and attorney for the residue received by the attorney in said sale, with interest from the time of the sale.

BILL IN CHANCERY. The object of the bill was to reach certain trust funds which had been wrongfully perverted. The defendants filed answers which were traversed, and testimony was taken tending to support the allegations of the bill and answers. At the September term, 1870, WHEELER, Chancellor, the bill was *pro forma* dismissed, from which the orator appealed. The clause of the will making the bequest in question was as follows:—

The remaining fourth part of said residue and remainder it is my will should remain in the hands of my two executors, and in the hands of the survivor of them and their successors in said office, for the benefit of my son, James Jervis Gilbert, during his life, hoping that he will need none of it, or at any rate no more than the interest, so long as he is able to labor. Nevertheless, it

is my intention to leave the disbursement of this part to the discretion of my executors and to the survivor of them and to their successors in said office. And in case of infirmity or misfortune, if my said son James Jervis should, in the judgment of my said executors, need a portion of the principal for his support they are authorized to let him have so much thereof as may to them appear necessary for the purpose aforesaid. At his decease, whatever may remain of said fourth part, I give to all his children, to be equally divided between them and their respective heirs for ever, without any reference to what I have before given to the two by his first wife.

The other facts in the case are sufficiently stated in the opinion of the court.

R. C. Abell, for the orator.

C. M. Willard and *J. Prout*, for the defendants.

The opinion of the court was delivered by

REDFIELD, J.—The bill states that the testator, Tilly Gilbert, made a bequest of one fourth part of the residue of his property to his executors *in trust* for his son James Jervis Gilbert. That Zimri Howe, the sole acting executor, paid all the debts and legacies of the testator except this provision for James Jervis Gilbert; that on the 29th of March 1864, John Howe was appointed administrator *de bonis non* of the estate of Tilly Gilbert with the will annexed; and that, on the 15th of June 1864, at the request of James Jervis Gilbert, he purchased with said trust funds a house and lot in Fairhaven, and took the title to himself, without naming the trust. That defendant Harris attached said house, as the property of John Howe, by the agency of defendant Willard, his attorney. Said writ was never entered in court, but on the 1st of February 1869, said Howe conveyed said house and lot to said Willard. John Howe having become insolvent and having removed from this state, he has been removed as administrator, by order of probate court, and the orator appointed in his place. Willard sold and conveyed the premises to Farmer for $1350; and claims, as the attorney of Howe, to retain of the avails of the sale about $700 to pay the debt of Harris.

I. It is insisted that the orator, as administrator *de bonis non* with the will annexed of the estate of Tilly Gilbert, cannot maintain this bill. Neither Zimri Howe nor his successor John Howe

have ever settled their administration accounts in probate court, or in any way been discharged from their trust as administrators of the estate. The "one-fourth the residue" of the estate has never been severed or set apart from the general assets of the estate by any order or decree of the court. Neither have given bonds, as trustee; nor have such funds been placed in the hands of either as trustee. In the case of *Newcomb* v. *Williams & Others*, 9 Met. 525, A. & B. were joint executors of a will, and gave a joint bond in probate court. The will created a trust, and imposed the duty upon B. of administering such special trust. The executors settled their account as executors, and the balance was retained in the sole possession of B., who gave no bond as trustee. Ch. J. SHAW, in giving the opinion of the court, says: "It seems to us very clearly that, by these proceedings, and by operation of law, the executors became responsible for the personal property of their testator, and *that they must remain thus responsible until some legal discharge is shown.*" Again, he says, page 534, "if the trust is cast upon them as executors, the execution of such trust is a duty superadded to their official duties as executors, and until they qualify themselves, and assume to act in their separate capacity as trustees, the bond to perform their duties as executors binds themselves and their sureties to the execution of such trust." See also *Conkey* v. *Dickinson*, 13 Met. 51; *Hall* v. *Cushing*, 9 Pick. 395; *Dorr* v. *Wainwright*, 13 Id. 328; *Towne* v. *Ammidown*, 20 Id. 535. We have no occasion to decide in this case to what extent the sureties of an executor would be bound, where the executor's account had been settled in probate court, and such executor had proceeded to administer the balance found in his hands as a special trust under the will without qualifying himself by giving bonds as trustee, and without order of the court passing the funds into his hands as trustee. We could readily conceive a case, where an executor had fully settled his executor's account, and by open and unequivocal acts had taken possession of the whole balance found in his hands, according to the will, and with the implied assent of the probate court, and had squandered such assets in the administration of a protracted trust, where there would be a patent equity in excusing the sureties of the executor from responding to such *devastavit*. But we see no reason in this case why John Howe could not properly have been called into probate court to make a final settle-

ment for all assets that came into his hands as administrator; and if all claims upon such assets are found to be satisfied, he should be required to qualify himself, and the funds by order of court passed into his hands as *trustee*. And if he should decline thus to qualify himself, another should be appointed trustee, who would execute the required bond.

And John Howe having perverted the assets of the estate to the purchase of real estate, without authority of the probate court, or warrant of the will, and sought to appropriate this property to the payment of his private debts, he was very properly removed, and required to settle his account. And we think it the right and duty of the orator to "gather up the fragments that remain" of said estate, and bring them into probate court, and place them in order and due course of administration according to the will. John Howe was never *discharged* as administrator because he had completed its duties, but *removed* because he refused to perform his duty.

James Jervis Gilbert is not entitled by the terms of the will to the possession and use of the fund as a beneficiary, but it is an active trust, requiring the action and discretion of the trustee. And it would seem, upon general equity principles, that the orator, as the representative of the estate and the will, is the very person to invoke a court of equity, that he may reach these funds, which have been wrongfully perverted, and appeal to any and every legitimate agency to bring these funds to the use provided in the will.

II. It is insisted that defendant Harris is a *bonâ fide* purchaser, without notice of the trust. Harris had paid no value, and had discharged no debt. Howe conveyed the estate to Willard, and authorized him to apply a portion of the avails to pay Harris's debt. Harris is not an innocent purchaser for value, for he has *paid* nothing. When a purchaser of trust-property has notice of the trust before the money to the full value of the property is *paid over*, and beyond his power to recall, he cannot be regarded an innocent *bonâ fide* purchaser: *Willoughby* v. *Willoughby*, 1 T. R. 763, 769; 2 Story's Eq. 754, § 1502.

But it is claimed that Harris was a creditor of John Howe, and obtained a valid lien by his attachment. That lien was dissolved, if any was had, when the suit was abandoned and the writ not entered in court. Yet if the writ had been entered in court, and

judgment rendered, and execution levied, all in legal form, Harris would "take in execution all that belonged to his debtor, and nothing more." And as John Howe had, in equity, no title, his creditor obtained none by his levy and set-off: *Hart, Leslie & Warren* v. *Farmers' & Mechanics' Bank*, 33 Vt. 252; 2 Story's Eq., § 1503 b.; 3 Redfield on Wills 538; *Hackett* v. *Calender*, 32 Vt. 97; *Poor* v. *Woodburn*, 25 Id. 234.

III. Willard, the attorney of Harris, was aware of the trust; and if the attorney had notice of the trust, the law will presume the notice was communicated to the client; and if this knowledge comes to the attorney or agent while acting in another and different transaction, the client and principal will be affected with notice: *Hart et al.* v. *F. & M. Bank, ut supra.* And the same rule is established in England: *Dresser* v. *Norwood*, 17 C. B. (N. S.) 466.

The great office of a court of equity, in matters of trust, is to follow trust-property alienated and perverted, and restore it to its place, that it may perform the duties assigned it; and we are relieved of all embarrassment in this case, lest we might wrong some party who had become innocently involved while dealing with the trust. No person possessing these attributes appears in this case.

The decree of the Court of Chancery, dismissing, *pro forma*, the orator's bill is reversed, and the case remanded, with directions to enter a decree for the orator against all the defendants for the amount of the money in said Willard's hands, received from the sale of the premises set forth in the bill, which he holds for the benefit of said Harris, and to the amount of Harris's debt; and a decree against the defendants Howe and Willard for the residue of the sum received by said Willard on sale of said property, not otherwise accounted for in probate court or paid to the orator,—interest to be computed from the time of such sale, and the orator recover his costs.

The foregoing case and opinion will interest the profession and all the lovers of justice, we are sure, in one important particular; in that it disposes of all merely formal and technical impediments in the way of reaching the simple honesty and decency of the case, in the most quiet and expeditious manner, and then addresses itself to its main work, in the most direct and effective mode, with the fewest words, and those most simple and natural. There is but one point in regard to which we desire to make any additional comment. The question how far the principal is bound by the knowledge of his agent, in regard to any im-

portant fact, however obtained, is one of great practical importance, and enters very largely into all the relations of commerce and trade, wherever questions of agency arise, as they do in regard to almost everything. There has heretofore been one rule maintained, or attempted to be maintained, viz., that the principal will not be affected by any knowledge which his agent may possess, unless obtained in the very transaction where the agent is acting, or at all events unless the agent, at the time he received the notice or information, so far represented the principal, that the same, at that time, became notice or information to the principal. There is, no doubt, great technical plausibility in this view of the law. For, if the agent, at the time he received the notice or information, was not in a position to represent the principal in receiving it, could he any more represent him in retaining it in his mind?

The earlier English cases and most of the American cases say clearly not, and therefore conclude that the knowledge thus in the mind of the agent will not preclude him from transacting any business for an innocent principal, which he could not do for himself, by reason of having obtained such knowledge. But the more recent and better considered cases, both English and American, seem fast tending towards the comprehension of the fact, that the principal and his agent are identical in most respects, and whatever affects one must necessarily affect both. One as agent cannot commit such a fraud, as if he were the principal would defeat the binding force of the transaction, without producing the same result as to the principal, however innocent. No more can the principal effect a transaction, fraudulent as to himself, and render it valid by means of using an innocent agent. The case of *Fuller* v. *Bennett*, 2 Hare 402, examined this question with some care, and comes to the conclusion, that where the vendor and vendee both employ the same solicitor to effect a sale and purchase, each must be affected by the knowledge of the solicitor acquired after his employment by either party, although, in fact, acquired before his employment by the other. This carries the effect of the knowledge beyond the fact of agency, at the time of its being acquired; and, if it be sound, shows that the effect of the knowledge of the agent will not depend upon the existence of the agency at the time the knowledge was obtained, but rather from its being in the mind of the agent at the time of exercising his agency. *Cornfoot* v. *Fowke*, 6 M. & W. 358, is the case which seems most effectually to have shocked the public sense of justice, as well as that of the profession, in regard to the propriety of making a distinction between the principal and his agent, in effecting a fraudulent transaction. The defendant agreed for the lease of a dwelling-house, next door to a brothel of the worst kind, upon the assurance made by the agent of the owner, that there was "nothing whatever objectionable about the house;" the fact being that the owner knew of these facts, but withheld them from his agent to enable him to obtain a favorable contract, and then insisted upon enforcing it for his own benefit. It is not wonderful that this case should have raised some suspicion in the profession, that there was something wrong somewhere, when a contract of this character could be made the basis of a judgment in court. The case has found few apologists except among those who claim to have found some excuse for it, in the form in which the defence was presented, it being placed on the ground that the contract was procured by fraud. These apologists argue, that as the agent was guilty of no fraud himself, having only represented what he believed to be true, therefore the plea was not proved. And Lord CRANWORTH, who formed one of

the court as Baron ROLFE, at the time the judgment was rendered, seems to put the construction just named upon it, in *National Exchange Co.* v. *Drew*, 32 Eng. Law and Eq. 1, 14, 15, where the case is discussed in the House of Lords, and a somewhat trenchant commentary made, upon its effect upon the moral sense, by Lord ST. LEONARDS. But the argument that the contract was not procured by fraud, because the principal made use of an innocent agent, would afford a justification for the most atrocious iniquities and crimes, or at least purge them of all criminality. It is, in fact, as puerile an evasion, as when one induces a blind man to throw stones through your windows, and then attempts to escape responsibility, on the ground that the damage was inflicted by an innocent agent.

The truth is, in such cases we have nothing to do with the agent. The contract is that of the principal, and it is wholly immaterial whether the agent acted fraudulently or ignorantly. His acts are not his own but those of the principal, and if fraudulent to the knowledge of the principal, they are in no sense purged of their fraudulent character, because the agent acted innocently. But the converse of this rule will not hold true, that if the principal is free from fraud, the transaction will stand, however much fraud the agent may have practised in obtaining it. A principal cannot purge his own fraud by employing an innocent agent. And no more can a fraudulent agent cover his fraud by shifting the contract or transaction into the hands of an innocent principal. The fallacy of this kind of argument seems to lie in considering the principal and his agent as distinct parties, or else ignoring the existence of the agent altogether. But the more just and reasonable view seems to be that taken by Lord DENMAN, C. J., in *Fuller* v. *Wilson*, 3 Q. B. 58, that the principal and his agent are to be regarded as one person, so far as knowledge of any fact affecting the justice of the case is concerned.

There has been some conflict between the English and American cases on the subject of policies of insurance being held valid, when obtained by the principal after the destruction of his property, but unknown to himself although known to his agent a sufficient time to have been communicated to the principal, and only withheld in order to enable him to effect a valid insurance, and thus save his loss. This is precisely one of those cases where a mind, wholly unsophisticated by the refinements of logic or law, would see, at once, the grossest fraud. But so good a lawyer and so acute a reasoner as Mr. Justice STORY was able to convince himself that such an insurance was entirely valid: *Ruggles* v. *General Interest Insurance Co*, 4 Mason 74. And the full bench, s. c. 12 Wheaton 408, affirmed the judgment, not upon the same ground indeed (for they seem to have felt its fallacy), but upon another ground, scarcely more plausible, that after the wreck of the ship the agency of the master ceased, and therefore the principal was not affected by his knowledge. The opposite view was taken in two English cases, decided before this, and which it virtually overruled: *Fitzherbert* v. *Mather*, 1 T. R. 12, 16; *Gladstone* v. *King*, 1 M. & S. 35, 38. And in the late case of *Proudfoot* v. *Montefiore*, Law Rep. 2 Q. B. 511, all those cases are carefully reviewed, and the old doctrine maintained, that the knowledge of the agent, which might and ought to have been communicated to the principal, and by him to the other party, and which was withheld for the fraudulent purpose of enabling him to obtain the insurance, was sufficient to avoid the policy. Those decisions show in a very bold view the wonderfully slight grounds upon which the acutest minds and the

most experienced judges are liable to be deluded and mistified, the moment they attempt to follow any legal distinction an inch beyond the point where its results conform to justice and fair dealing. We may always feel sure that any course of reasoning, though plausible, which leads to such false consequences, must involve some fatal fallacy, however it may elude our grasp. And the most convincing argument in favor of the rule, which compels the agent to communicate to his principal all knowledge in his possession, and which he has the legal right to use in his own interest, however he may have obtained it, and which affects the principal by all such knowledge which the agent might communicate, upon the presumption he will do his duty, is that it promotes honesty and fair dealing among men, while the former one is based upon reserve and evasion. It is based upon the principle, that the knowledge of the principal, which he ought to communicate to the agent, and *vice versâ* shall have the same effect upon the validity of transactions by either, as if it had been communicated, upon the presumption that each will do his duty.

Since preparing the foregoing note we find the Supreme Court of the United States, in *The Distilled Spirits*, 11 Wall. 356, have declared the rule almost in the precise words we contend for. The note of that case is, "The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence." I. F. R.

Supreme Court of the United States.

FRANK TREBILCOCK *v.* BENJAMIN WILSON ET UX.

Where a plaintiff in error claimed in the court below, that he was entitled to have a note held by him made by the defendant in error paid in gold or silver coin under the Constitution, upon a proper construction of various clauses of that instrument, and the decision of the court below was against the right thus claimed, this court has appellate jurisdiction under the 25th section of the Judiciary Act of 1789, or the 2d section of the Amendatory Judiciary Act of 1867, to review the decision. The case of *Roosevelt* v. *Meyer*, 1 Wallace 512, overruled.

Where a note is for dollars, payable by its terms, *in specie*, the terms "*in specie*" are merely descriptive of the kind of dollars in which the note is payable, there being more than one kind of dollars currrent recognised by law; and mean that the designated number of dollars shall be paid in so many gold or silver dollars of the coinage of the United States.

The Act of February 25th 1862, in declaring that the notes of the United States shall be lawful money and a legal tender for all debts, only applies to debts which are payable in money generally, and not to obligations payable in commodities or obligations of any other kind.

When a contract for money is, by its terms, made payable in specie or in coin, judgment may be entered thereon for coined dollars: *Bronson* v. *Rhodes*, 7 Wallace 229, affirmed.

IN error to the Supreme Court of the State of Iowa.

In June 1861, Benjamin Wilson, one of the plaintiffs in the court below, gave to the defendant his promissory note for nine hundred dollars, due one year after date with ten per cent. interest, *payable in specie;* and at the same time, to secure its payment, executed, in connection with his wife, and delivered to the defendant a mortgage upon certain real property in the state of Iowa. This mortgage was duly recorded in the office of the recorder of the county where the land was situated.

In February, 1863, Wilson offered to pay the defendant the amount due on the note, principal and interest, and for that purpose tendered to him such amount in United States notes, declared by the Act of Congress of February 25th 1862, 12 Statutes at Large 345, to be a legal tender for all debts, public and private, with certain exceptions, but the defendant refused to receive them, claiming that the note was payable in gold or silver coin of the United States.

In July 1865, the plaintiffs, who were then residents of Iowa, presented to one of the district courts of that state their petition, setting forth the alleged tender, and praying that the defendant might be required, by its decree, to release and discharge the mortgage upon the proper book of record, as required by law upon the payment of a mortgage-debt, averring that they had kept the money tendered, ready to pay the defendant, and that they brought the same into court for that purpose.

The defendant demurred to the petition on several grounds, but the only one presented for consideration here, was that the tender was not a good and sufficient tender, because not made in gold and silver coin, in which alone the note was payable.

The court overruled the demurrer, and in September 1866, gave its decree for the plaintiffs, that the mortgage be cancelled, and that the defendant enter satisfaction of it upon the record, holding that the tender was legal and sufficient.

On appeal to the Supreme Court of the state this decree was, in October 1867, affirmed, and the defendant took this writ of error.

The opinion of the court was delivered by

FIELD, J.—The principal question presented for our consideration is, whether a promissory note of an individual, payable by its

terms *in specie*, can be satisfied, against the will of the holder, by the tender of notes of the United States declared by the Act of Congress of February 25th 1862 to be a legal tender in payment of debts.

There is, however, a preliminary question of jurisdiction raised, which must be first disposed of. The state court, in holding the tender legal and sufficient, sustained the validity and constitutionality of the Act of Congress declaring the notes a legal tender. Its decision was, therefore, in favor of, and not against, the right claimed by the plaintiffs under the Act of Congress, and hence it is contended that the appellate jurisdiction of this court does not arise under the 25th section of the Judiciary Act of 1789. Some support is given to this view by the decision of this court in *Roosevelt* v. *Meyer*, 1 Wall. 512, where it was held that, as the validity of the Legal Tender Act was drawn in question in that case, and the decision of the state court was in favor of it, and of the right set up by the defendant, this court had no jurisdiction to review the judgment, and a dismissal of the case was accordingly ordered. The court in that case confined its attention to the first clause of the 25th section of the Judiciary Act, and in its *decision*, appears to have overlooked the third clause. That section provides for the review of the final judgments and decrees of the highest court of a state in which decisions could be had, in three classes of cases:—

First. Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against the validity;

Second. Where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity; and,

Third. Where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the Constitution, treaty, statute, or commission.

Under this last clause the appellate jurisdiction of this court in the case of *Roosevelt* v. *Meyer* might have been sustained. The plaintiff in error in that case claimed the right to have the bond

of the defendant paid in gold or silver coin under the Constitution, upon a proper construction of that clause, which authorizes Congress to coin money and regulate the value thereof and of foreign coin; and of those articles of the Amendments which protect a person from deprivation of his property without due process of law, and declare that the enumeration of certain rights in the Constitution shall not be construed as a denial or disparagement of others retained by the people; and reserve to the states or the people the powers not delegated to the United States or prohibited to the states.

The decision of the court below being against the right of the plaintiff in error claimed under the clauses of the Constitution, the construction of which was thus drawn in question, he was entitled to have the decision brought before this court for re-examination.

In the present case, as the defendant claimed a similar right upon a construction of the same and other clauses of the Constitution, and a like adverse decision of the court below was made, he is equally entitled to ask for a re-examination of the decision.

But the defendant also claimed a right to demand coin in payment of the note of the plaintiff by the Acts of Congress regulating the gold and silver coins of the United States, and making them a legal tender in payment of all sums according to their nominal or declared values, contending that the Act of 1862, making notes of the United States a legal tender for debts, did not apply to the contract in suit. He thus claimed in fact, although he did not state his position in this form, that, upon a proper construction of the several acts together, he was entitled to payment in coin. This right having been denied by an adverse decision, he was clearly in a condition to invoke the appellate jurisdiction of this court for the review of the decision.

Nor is the appellate jurisdiction of this court, in this case, affected by the change in the language of the third clause of the 25th section of the Judiciary Act of 1789, by the 2d section of the Amendatory Judiciary Act of February 5th 1867. By this clause in the latter act the judgment or decree of the highest court of a state can be reviewed "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity

specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority." The section came incidentally before the court, at the last term, in *Stewart* v. *Kahn*, 11 Wall. 502, but it was not deemed necessary to determine whether it had superseded the 25th section of the Judiciary Act of 1789. As there observed, it is to a great extent a transcript of that section; and several of the alterations of phraseology are not material. The principal addition is found in the second clause, and the principal omission is at the close of the section. But in this case, as in that, there is no occasion to express any opinion as to the effect of the new section upon the original. Under the new section, as under the old, if that be superseded, the plaintiff in error can seek a review of the decision made against the right claimed by him.

We proceed, then, to consider the merits of the case. The note of the plaintiff is made payable, as already stated, *in specie*. The use of these terms, *in specie*, does not assimilate the note to an instrument in which the amount stated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit or grain. Such contracts are generally made because it is more convenient for the maker to furnish the articles designated than to pay the money. He has his option of doing either at the maturity of the contract, but if he is then unable to furnish the articles, or neglects to do so, the number of dollars specified is the measure of recovery. But here the terms, *in specie*, are merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation, recognised by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States. They have acquired this meaning by general usage among traders, merchants, and bankers, and are the opposite of the terms *in currency*, which are used when it is desired to make a note payable in paper money. These latter terms, *in currency*, mean that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars: *Taup* v. *Drew*, 10 How. 218.

This being the meaning of the terms *in specie*, the case is brought directly within the decision of *Bronson* v. *Rhodes*, 7 Wall. 229, where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined

dollars, and could not be discharged by notes of the United States declared to be a legal tender in payment of debts.

The several Coinage Acts of Congress make the gold and silver coins of the United States a legal tender in all payments, according to their nominal or declared values. The provisions of the Act of January 18th 1837, and of March 3d 1849, in this respect, were in force when the Act of February 25th 1862, was passed, and still remain in force. As the Act of 1862 declares that the notes of the United States shall also be lawful money and a legal tender in payment of debts, and this act has been sustained by the recent decision of this court as valid and constitutional, we have, *according to that decision*, two kinds of money essentially different in their nature, but equally lawful. It follows, from that decision, that the contracts payable in either, or for the possession of either, must be equally lawful, and if lawful must be equally capable of enforcement. The Act of 1862 itself distinguishes between the two kinds of dollars in providing for the payment in coin of duties on imports and the interest on the bonds and notes of the government. It is obvious that the requirement of coin for duties could not be complied with by the importer, nor could his necessities for the purchase of goods in a foreign market be answered, if his contracts for coin could not be specifically enforced, but could be satisfied by an offer to pay its nominal equivalent in note dollars.

The contemporaneous and subsequent legislation of Congress has distinguished between the two kinds of dollars. The Act of March 17th 1862 (12 Stats. at Large 370), passed within one month after the passage of the first Legal Tender Act, authorized the secretary of the treasury to purchase coin with bonds or United States notes, at such rates and upon such terms as he might deem most advantageous to the public interest, thus recognising that the notes and the coin were not exchangeable in the market according to their legal or nominal values.

The Act of March 3d 1863, 12 Stats. at Large 719, § 4, amending the Internal Revenue Act, required contracts for the purchase or sale of gold or silver coin to be in writing, or printed, and signed by the parties, their agents or attorneys, and stamped; thus impliedly recognising the validity of previous contracts of that character without this formality. The same act also contained various provisions respecting contracts for the loan of cur-

rency secured by a pledge or deposit of gold or silver coin, where the contracts were not to be performed within three days.

Legislation of a later date has required all persons making returns of income, to declare "whether the several rates and amounts therein contained are stated according to their values in legal tender currency, or according to their values in coined money," and if stated "in coined money" it is made the duty of the assessor to reduce the rates and amounts "to their equivalent in legal tender currency according to the value of such coined money in said currency for the time covered by said returns:" 14 Stats. at Large 147.

The practice of the government has corresponded with the legislation we have mentioned. It has uniformly recognised in its fiscal affairs the distinction in value between the paper currency and coin. Some of its loans are made payable specifically in coin, whilst others are payable generally in lawful money. It goes frequently into the money market, and at one time buys coin with currency, and at another time sells coin for currency. In its transactions it every day issues its checks, bills, and obligations, some of which are payable in gold, while others are payable simply in dollars. And it keeps its accounts of coin and currency distinct and separate.

If we look to the Act of 1862, in the light of the contemporaneous and subsequent legislation of Congress, and of the practice of the government, we shall find little difficulty in holding that it was not intended to interfere in any respect with existing or subsequent contracts payable by their express terms in specie; and that when it declares that the notes of the United States shall be lawful money, and a legal tender for all debts, it means for all debts which are payable in money generally, and not obligations payable in commodities, or obligations of any other kind.

In the case of *Cheang-Kee* v. *The United States*, 3 Wall. 320, a judgment for unpaid duties, payable in gold and silver coin of the United States, rendered by the Circuit Court for the District of California, was affirmed by this court.

It is evident that a judgment in any other form would often fail to secure to the United States payment in coin, which the law required, or its equivalent. If the judgment were rendered for the payment of dollars generally, it might, according to the recent decision of this court, be paid in note-dollars, and, if they

were depreciated, the government would not recover what it was entitled to receive. If, on the other hand, the value of the coin was estimated in currency, and judgment for the amount entered, the government, in case of any delay in the payment of the judgment, by appeal or otherwise, would run the risk of losing a portion of what it was entitled to receive by the intermediate fluctuations in the value of the currency. From considerations of this kind this court felt justified in sustaining the judgment of the Circuit Court for California, requiring its amount to be paid specifically in coin, as being the only mode by which the law could be fully enforced.[1] The same reasoning justified similar judgments upon contracts that stipulated specifically for the payment of coin. The 20th section of the Act of 1792, 1 Stat. at Large 250, § 20, establishing a mint and regulating the coins of the United States, in providing that the money of account of the United States shall be expressed in dollars, dimes, cents, and mills, and that all proceedings in the courts of the United States shall be kept in conformity with this regulation, impliedly, if not directly, sanctions the entry of judgments in this form. The section has reference to the coins prescribed by the act, and when, by the creation of a paper currency, another kind of money, expressed by similar designations, was sanctioned by law and made a tender in payment of debts, it was necessary, as stated in *Bronson* v. *Rhodes*, to avoid ambiguity and prevent a failure of justice, to allow judgments to be entered for the payment of coined dollars, when that kind of money was specifically designated in the contracts upon which suits were brought.

[1] The 12th section of the Act of Congress of March 3d 1865, entitled, "An act amendatory of certain acts imposing duties upon foreign importations," enacts: "That in all proceedings brought by the United States in any court for due recovery, as well of duties upon imports alone as of penalties for the non-payment thereof, the judgment shall recite that the same is rendered for duties, and such judgment, interest and costs shall be payable in coin by law receivable for duties, and the execution issued on such judgment shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and, in case of levy upon and sale of the property of the judgment-debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution."

It appears, from the examination of the record in *Cheang-Kee* v. *The United States*, that the judgment of the Circuit Court in that case, affirmed by the Supreme Court, was rendered before this act was passed, namely, on the 8th of August 1864.

It follows, from the views expressed, that the judgment of the Supreme Court of Iowa must be reversed, and that court directed to remand the cause to the proper inferior court of the state for further proceedings in conformity witth this opinion; and it is so ordered.

BRADLEY, J.—I dissent from the opinion of the court in this case for reasons stated in my opinion delivered in the cases of *Knox* v. *Lee* and *Parker* v. *Davis*. In all cases where the contract is to pay a certain sum of money of the United States, in whatever phraseology that money may be described (except cases specially exempted by law), I hold that the legal-tender acts make the treasury notes a legal tender. Only in those cases in which gold and silver are stipulated for as bullion can they be demanded in specie, like any other chattel. Contracts for specie made since the legal tender acts went into operation, when gold became a commodity subject to market prices, may be regarded as contracts for bullion. But all contracts for money made before the acts were passed must, in my judgment, be regarded as on the same platform. No difficulty can arise in this view of the case in sustaining all proper transactions for the purchase and sale of gold coin.

MILLER, J.—In the case of *Bronson* v. *Rhodes* I expressed my dissent on the ground that a contract for gold dollars, in terms, was in no respect different, in legal effect, from a contract for dollars without the qualifying words, specie or gold, and that the legal-tender statutes had, therefore, the same effect in both cases.

I adhere to that opinion, and dissent from the one just delivered by the court.

Supreme Court of Pennsylvania.

JOHNSON v. THE PHILADELPHIA AND WEST CHESTER RAILROAD COMPANY.

A passenger from Baltimore to West Chester, possessing a through ticket, good over both roads, attempted at the junction to pass from the Baltimore car and enter the West Chester car, but being encumbered with bundles, and the West Chester train moving on without stopping a reasonable time to make a transfer of the passengers, he missed his footing, fell to the track, and had his right arm crushed by the wheels of the car. *Held:* 1. Under the arrangement between the railroad companies for through tickets, it was their duty to give a reasonable time for the transfer of passengers and their baggage. 2. The wrong of the company in not

allowing a reasonable time for such transfer, together with its influence upon the mind and act of the passenger, should be considered in discussing the question of negligence. 3. The judge below should have left it to the jury to say, under all the circumstances in evidence, whether the danger of boarding the train when in motion was so apparent as to have made it the duty of the plaintiff to desist from the attempt. He should have left the question of negligence on the part of the plaintiff to be determined by the jury upon the circumstances.

ERROR to the Court of Common Pleas of *Chester county.*

The opinion of the court was delivered by

AGNEW, J.—This case appears to have been carefully tried by the learned and able judge in the court below. Yet, after an attentive examination, we are led to the conclusion, that the rule of concurrent negligence was held a little too closely against the plaintiff, and the province of the jury rather trenched upon. The judge himself states the well-known rule that, "generally what constitutes negligence in a particular case is a question for the jury:" *Kay* v. *Penna. Railroad Co.*, 15 P. F. Smith 273, 274; *Penna. Canal Co.* v. *Bently*, 16 Id. 30. But we think his error was in laying down, as a rule of *law*, a matter which was only an element in the evidence, to wit, that if the train was distinctly running on the track, so as to be perceptible to those alongside, the plaintiff was guilty of negligence in attempting to enter upon the train, and could not recover. The following passages in the charge perhaps most clearly denote the spirit and meaning of the instruction given to the jury:—

"Yet, if the train was entirely still when he stepped from the platform by its side, it is not suggested that there was any want of care in the attempt to enter. If, however, it was not entirely still—was in the act of starting—taking up the slack, as one of the witnesses has denominated it, but was not yet distinctly under way when he attempted to enter, then it is for you to determine whether he was or was not guilty of carelessness in making the attempt, encumbered as he was." "The defendant has asked us to instruct you, that if the train was in *motion* when the plaintiff attempted to get upon it, he was guilty of negligence, and cannot recover. If by the term 'motion' is meant running upon the track—distinctly running so as to be perceptible to those alongside—the point is affirmed, otherwise it is not. There may have been some motion incident to starting, and preceding it, yet of so slight a character that the law cannot pronounce an attempt to

enter at the time negligence; but must leave it to the jury to judge of it in the light of all the circumstances. But if the train was distinctly running upon the track when the plaintiff attempted to enter, then he was guilty of negligence, and cannot recover."

It is evident that the meaning which a jury would draw from the charge was, that if the preparation for starting was over, and the train was under way, that, no matter how slow the motion, yet if the running of the train on the track was distinctly visible to a bystander, the plaintiff's time to enter was past, and his attempt to get on the train would be such culpable negligence *in law* as would bar his recovery. That such a rule may be applicable to some cases may be true, though we do not now affirm it. But clearly we are not to leave out of view, in all cases, the conduct of the railroad company in producing the result, and the natural and probable effect that conduct has had upon the mind of the passenger in influencing his act. There cannot be an inexorable rule so unbending that no circumstances begotten by the railroad company itself shall not change it. Even when a train is distinctly under way, there are cases, and this was one, where it must be left to the jury to say whether the danger of going aboard was so apparent that it would be culpable negligence in the passenger to attempt it. Here the West Chester Railroad Company had a running arrangement with the Philadelphia and Baltimore Central Railroad Company, by which their trains met at the Baltimore Junction, and passengers were received from each on through tickets. The plaintiff's ticket is not questioned. Under such an arrangement, it is the duty of each company to give a reasonable time for the transfer of passengers and their baggage. In this instance, it appears that the West Chester train began to move almost as soon as the Baltimore train stopped. It seems that the conductor of the latter signalled the conductor of the former that he had no passengers for the West Chester train. But the plaintiff, who had a through ticket, was not responsible for this mistake. Reasonable time should be allowed to develop the fact whether there are passengers. A through ticket issued under such an arrangement is binding on both roads. The plaintiff, it seems, hastened across the platform, and attempted to enter, but, being encumbered with a valise, a bundle, and a coil of pipe on his arm, he missed his footing, fell to the track, and his right arm was crushed by the wheels of the car. The

fact appears to be clear, that a reasonable time for the transfer was not given, and that the plaintiff, with all his effort to make haste, was unable to make the connection in consequence of this want of time. Now, though the train was distinctly in motion, so that a bystander, cool and unconcerned, could see it visibly running on the track, are we to say, as a matter of law binding on the jury, that a passenger, having a right to go on the train, and seeing himself about to be left improperly by the wayside, is guilty of culpable legal negligence if he should essay to reach his destination, no matter how slow the motion in running might be, or how little danger was apparent to him? He may be guilty of negligence, but of this the jury should judge under the circumstances. He may not "set his life or limbs on the hazard of a leap at the running train," as the judge emphatically said, and doubtless if such were the character of his attempt it would be negligence. The expression "leap at a running train," denotes a higher effort and less consideration on part of the traveller, than merely attempting to board a car under way. In the former a jury might discover negligence, while in the latter they might not, in view of the circumstances, discover any.

In discussing the conduct of the passenger merely, we are not to lay out of sight the wrong of the company, *in its influence upon his mind and act.* He may have strong motives to reach his destination—indeed, no man but must feel, and feel strongly, at being left by the wayside; he is conscious of his right to go aboard, and naturally becomes excited at the sight of the moving train, perhaps is alarmed, and in some degree confused. If the train be running slowly, and the danger is not apparent to him, what so natural as that he should hurry to reach the train, and to get aboard? But if we lay down the inexorable rule for this and every other case, that whenever the train can be seen to be distinctly running, it is legal negligence to attempt to get on, we set a premium on the wrong of the company, which influenced the very act itself. To say that whenever the motion of the train is so distinct that bystanders can distinctly see it under way, and running along the track, the passenger is to be as cool and unconcerned as they, fold his arms, and say to himself, I'll sue you for this breach of contract in leaving me here, is to him bitterness itself. He may be a stranger, and know not where to find accommodation; the severity of the winter may surround him, or the

heat of summer oppress him; the elements may war against him, and night or approaching darkness may heighten his alarm. Or, if no stranger, his business may be urgent; his family may require his presence; his health may be poor; his means limited; his desire to reach his destination overpowering, and a hundred reasons may influence him to go on. Now, are we to say, that the wrong, which has caused his mind to be excited, and aroused his fears, which confuses him, and has made him less cool and calculating, than those who are standing by, and can look upon the departing train without emotion, is not to be taken into the account in considering his act? What caused his state of mind? Not his own carelessness or breach of duty as a passenger, but the illegal and wrongful act of the carriers. Surely it does not lie in the mouth of the railroad company to say to him, the law will take no account of our breach of duty in its effect upon you. You ought not to have suffered it to move you, but if you saw our train was moving along the track, the slack taken up, the train stretched out, and the cars under way, so that any one else could distinctly see it running, you ought to have looked upon our leaving you on the wayside with perfect coolness; made no effort to go, and sued us for our breach of the contract of carriage. No matter how slow the motion of the train was, nor how little danger in getting on was apparent to you, or what the state of your mind caused by our wrongful act, it is not a question for a jury under the circumstances, but the law holds you guilty of culpable negligence in the attempt to board the train, and we are allowed to go free. This is too stringent a rule for the case. Culpable negligence is the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do, under all the circumstances surrounding the particular case: Shearman & Redfield on Negligence, § 7; *Kay* v. *Pennsylvania R. R. Co.*, 14 P. F. Smith 273. Instead, therefore, of the rule laid down by the learned judge, he should have left it to the jury to say, under all the circumstances in evidence, whether the danger of boarding the train, when in motion, was so apparent, as to have made it the duty of the plaintiff to desist from the attempt. There is no objection to the court's assisting the jury in the performance of their duty, by reminding them of the danger of boarding a train in motion, and the caution and care that passengers should use, as well as of the duties of the

carriers, and the influence of their wrongful acts in producing the catastrophe. But railroad companies are bound to remember that they owe duties to the public, for whose benefit their charters have been granted, and therefore should not be lightly loosed from the effects of their own wrongful acts. We are of opinion the court should have left the question of negligence on the part of the plaintiff to be determined by the jury upon the circumstances, and under an instruction less stringent and binding as to the duty of the plaintiff. Judgment reversed, and a *venire facias de novo* awarded.

Court of Appeals of Kentucky.

JOSEPH McREYNOLDS ET AL. *v.* CHARLES G. SMALLHOUSE.

The Act of 9th March 1868 incorporating the "Green and Barren River Company," and leasing to the said company the river line of navigation, with all the franchises and appurtenances, together with the right to take tolls, &c., is not in violation of the provision of the National Constitution, forbidding any state without the consent of Congress, to levy any duty of tonnage.

Nor is the act in violation of that clause of the Constitution of the United States, which gives Congress the power "to regulate commerce with foreign nations and among the several states."

The 37th section of article 2d of the state Constitution was adopted to prevent amendments to legislative enactments, by which *distinct* and *unconnected* matters might be introduced in the same law, and is not to be construed as applying to a case, where all the provisions of a statute relate, directly or indirectly, to the same subject, and are not foreign to the subject embraced in the title.

The state legislature having entire control of the funds arising from the collection of tolls on the river line of navigation, could appropriate them to repairing the locks or dams, in preference to placing them to the credit of the sinking fund; and when the cost of repairs greatly exceeded the revenue derived from such navigation, it was authorized to lease the right to take the tolls, without violating the provision of the state Constitution, declaring that the General Assembly should have no power to pass laws to diminish the revenues of the sinking fund."

APPEAL from the Daviess Circuit Court.

J. W. Bickens and *Azro Dyer*, for appellant.

T. H. Hines, for appellee.

The opinion of the court was delivered by

PRYOR, C. J.—This petition in equity was originally instituted in the McLean Circuit Court, and by change of venue was heard and determined in the Daviess Circuit. Upon the filing of the

petition the appellants obtained an injunction enjoining and restraining the appellee (Smallhouse), who was one of the members of the Green and Barren River Navigation Company, from collecting any tolls from the appellants, by reason of the passage of their boats in and through the locks upon said rivers, the appellee being at the time the agent of the company, and authorized by the company to collect toll. The appellants, at the time they filed their petition, viz., in July 1869, were navigating the waters of the Ohio, Green and Barren rivers, with their boats, from the city of Evansville, Indiana, to various points on Green and Barren rivers, and upon the refusal of the appellee to permit them to pass the locks on Green river with their boats, without paying toll, these proceedings were instituted.

The appellee, in behalf of the company, and in his own defence, relies upon an Act of the Legislature of Kentucky, passed on the 9th of March 1868, entitled "An Act to incorporate the Green and Barren River Navigation Company." By which he alleges the legislature loaned to the company, for thirty years, the Green and Barren river line of navigation, with the right to collect tolls, &c., together with all the franchises and appurtenances thereunto belonging. Upon the hearing of the case in the court below, the appellants' petition was dismissed and the injunction dissolved, and the cause is now in this court for revision.

The appellants insist that so much of the charter of the navigation company as empowers it to charge and collect tolls from boats running upon these rivers, is in violation of both the state and Federal Constitutions.

1. That it violates section 37 of article 2 of the Constitution of this state, declaring, "That no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

2. That it violates section 34 of article 2 of the state Constitution, declaring that "the General Assembly shall have no power to pass laws to diminish the resources of the sinking fund, as now established by law, until the debt of the state shall be paid, but may pass laws to increase them," &c.

3. That it violates section 1 of article 13, state Constitution, declaring that "no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services."

4. That it violates that provision of the Constitution of the United States which forbids any state, without the consent of Congress, to levy any duty of tonnage.

5. That it is in violation of that provision of the Constitution of the United States which gives to Congress power to regulate commerce with foreign nations and among the several states, and with the Indian tribes.

The preamble to the act of incorporation is as follows, viz. :—

"Whereas, the Green and Barren river line of navigation has always been a charge upon the state, and is now largely in debt and without prospect of any better condition; and whereas, it is of great importance to the country to keep said line in working order, and at the same time to avoid any public expense if possible; and believing that object can be accomplished by letting it to an incorporated company; therefore, be it enacted," &c.

The 2d and 3d sections of the act transfer to the company all the rights, franchises, &c., pertaining to this line of navigation, to be used for the purpose of navigation for and during the term of thirty years, and directs the executive of the state to cause possession thereof to be delivered to the company upon their complying with the other provisions of the act. The 4th section of the act makes it the duty of the company to use diligence in keeping said line of navigation in good repair, &c. "To pass and permit *all boats, crafts and other things to navigate said rivers according to certain specified rates herein prescribed* as tolls, which shall enure to said company."

The 6th section provides that the rate of tolls for such boats as passenger and freight steamboats passing such locks shall not exceed per ton, measured as aforesaid, fifty cents at the first lock, thirty cents at the second, and twenty cents at the third, and ten cents each at the two other upper locks, and the same for returning; and for all other boats, barges, rafts, water-crafts, &c., they may establish tolls from time to time, not exceeding the present rates established by the board of internal improvements, as applicable to the Kentucky Green and Barren lines of navigation.

The 11th section of the act requires the company to execute bond with surety, payable to the Commonwealth of Kentucky, to be approved by the governor, in the penal sum of five hundred thousand dollars, for the performance of the duties and obligations imposed upon them by the act.

This bond was executed by the company, approved by the governor, and the possession of the improvements as required by the act delivered to them. The first objection urged by counsel for appellant against the constitutionality of the act in question has been in effect settled by this court in the case of *Phillips* v. *The Covington and Cincinnati Bridge Company*, 2 Met. 222, and also in the case of *The Louisville and Oldham Turnpike Road Company* v. *Ballard*, 2 Id. 168.

In the case of *Phillips* v. *The Bridge Company*, this court says, that the constitutional provision under consideration, was adopted to prevent amendments to legislative enactments, by which distinct and unconnected matters might be introduced, but that this provision of the Constitution should not be so construed as to restrict legislation to such an extent as to render different acts necessary where the whole subject-matter is connected, and may be properly embraced in the same act; and the rule laid down in this case is, "that none of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title."

This rule of construction has been adhered to by this court in several subsequent cases, and is sustained upon both principle and authority.

The act in this case is entitled, "An Act to incorporate the Green and Barren River Navigation Company." The object to be accomplished by the act is to create a company for the purpose of navigating Green and Barren rivers with their boats, and this is in fact the subject-matter of the title.

The legislature, having created the corporation, proceeds, by various sections of the act, to prescribe the rights, duties, and obligations of the company.

In enumerating the rights to which this company are entitled, we find that they have the right to navigate these streams with their boats for thirty years, and to charge toll for the passage of other boats than their own, not exceeding certain prescribed rates, and in order to facilitate commerce and trade, and to develop the resources of wealth along the line, they are empowered to work coal-mines, and to lease and purchase real estate.

In consideration of these rights, they obligate themselves to keep the locks and dams in repair, and to permit the owners of

all boats to navigate said rivers upon the payment of tolls as regulated by the act. We perceive no provision contained in any of the various sections of the charter inconsistent with its title. The right to collect tolls is certainly not foreign to the subject embraced in the title, but has a direct relation to it; for without the tolls the corporation would be divested of all means enabling them to keep these improvements in repair; as it can hardly be presumed that the company would assume such heavy pecuniary obligations as that of improving these locks and dams, without any other consideration than the right of passage with their own boats, and at the same time giving to all other vessels the right of navigation free of toll.

One of the principal objects of the legislature in conferring these rights, was to enable the company to raise means by which they would be able to comply with their agreement, and thereby rid the state of a burden that was constantly increasing upon the taxable property of the citizens.

Such powers as are delegated by this act are given in most instances to all corporations created for the purpose of internal improvements. The right to turnpike companies to charge tolls, to purchase land for toll-houses; to railroad companies to purchase land for depots, to submit questions of taxation to the votes of the people, to enable them to build roads, to sell bonds and mortgage their road in aid of its construction. All the rights and powers given this corporation have reference to the subject-matter of the act, and to decide the present act unconstitutional upon the ground that it is in violation of the 37th section of Article 2 of the Constitution, would be, in effect, annulling nearly all charters heretofore granted by the legislature for internal improvement purposes.

No encroachment should be made upon the legislative powers of a state, by deciding its laws to be in violation of the Constitution, unless there has been a clear and palpable violation of that instrument. All doubts in the mind of the judge must result in favor of the validity of the law. This is no issue between the Commonwealth and the company as to the extent of the power conferred upon them by the act. In such a case a different rule would prevail, and the law construed strictly as against the corporation. The grant of the powers is, in this case, conceded, and the only question made is, as to the constitutionality of the law, and this court

must uphold the law unless it is clearly within some constitutional inhibition.

The appellants also insist that the transfer or lease by the state of these improvements diminishes the resources of the sinking fund, and that for this reason the act is void.

The act establishing the Sinking Fund provides that a sinking fund shall be, and is "hereby created and established, to be made up" among other things "of profits which may accrue on works of internal improvements made by the state, or in which the state is, or may be interested."

The constitution provides that the resources of the sinking fund shall be sacredly set apart and applied to the payment of state debt, which has not been paid.

The state of Kentucky appropriated a large sum of money in improving the navigation on Green river, and in constructing the locks and dams thereon. Previous to the time at which these improvements were made, this stream was only navigable for boats of any magnitude during high water.—The natural obstructions to navigation consisted of falls and shoals, all of which obstructions were removed or overcome by reason of these improvements, and the river, except when the locks were out of repair, made navigable as many months in the year as the Ohio.

These improvements seemed to have yielded the state but little, if any revenue, and in March, 1868, at the time of the passage of this act, the legislature of the state (composed in part of many members directly and vitally interested in the prosperity of that part of the state), in the preamble to the act announced that the improvement had "*always* been a charge on the state and is now largely in debt, without prospect of any better condition."

The truth of this legislative declaration, in the absence of proof, we cannot question. The record also shows that some of the dams were much out of repair, and were about to be swept off by the waters. The legislature refused to repair the improvements by increasing the burden of taxation on the citizens. No revenue was being derived from these rivers, and instead of increasing the resources of the sinking fund, thereby lessening the state debt, their constant repairs were increasing the indebtedness.

The tolls accruing from the navigation of these rivers could all have been appropriated to repairing the locks and dams. The

legislature had entire control of this fund for such purposes until it was placed in the treasury to the credit of the sinking fund, and then it must be applied to the payment of the state debt.

By a large expenditure of money, the state had made Green river, practically a navigable stream. Previous to this expenditure it was only navigable for a few months in the year for large boats, and then not exceeding seventy-five or one hundred miles from its mouth. A wild but fertile country had been developed by these improvements, and with it a trade and commerce equal almost to that of any other portion of the state; lands had increased in value from five to thirty dollars per acre, and the state of Kentucky had either to continue to increase the burden of taxation upon the people to preserve the improvements, or resort to some other means by which they could be secured, in order to save the expenditure to the state, and that its people might reap some benefits from it. The legislature saw proper to lease it to this company. Whether this contract of leasing was a good or bad contract, is not for this court to determine. There is no fraud alleged in the procurement of this act; there is no allegation that the tariff on other boats amounts to a prohibition of navigation upon these streams, or that the tolls charged the present appellants were exorbitant.

There is no allegation that the charges for freight are excessive, or that the company failed to provide means for transporting freight and passengers, or have failed to comply with their contract. All the proof upon this subject is inapplicable to the allegations of the petition, and if these wrongs exist the parties aggrieved thereby have an ample remedy through the judicial department of the state. The leasing of these improvements and their continued preservation may be the means of increasing the resources of the sinking fund, but whether it does or not, it certainly does not lessen the revenues, as, but for the leasing, these improvements would have been lost to the state, and to the people directly interested in preserving them.

Any other view of this question would compel the state to hold on to these improvements at the expense of the taxable property of the state, or permit them to go to ruin and decay.

This court, in the case of *The Simpson County Court* v. *Arnold*, 7 Bush 354, sustains this view of the case. It is not deemed necessary to allude to the other constitutional questions made.

These rivers are exclusively within the territory of Kentucky, and were made navigable by large expenditures of money by the state and its citizens.

The citizen of any other state has the same right to navigate these rivers that a citizen of this state has by paying the same tolls, and being made subject to the same restrictions. If there is no discrimination made, there can be no complaint. The state has the power to improve her rivers by making them navigable, and to charge tolls for the use of them. If Congress has any power to prevent a state from exercising this right, it will be time enough to decide such a question when such prohibitory legislation is enacted. That the appellee or the company are now making large profits by navigating these rivers with their boats is no argument against the validity of their charter.

All persons, so far as the proof shows, are required to pay the same tolls upon these rivers. No inequality exists, except so far as the lessees are concerned, and their undertaking to keep the improvements in repair was deemed a sufficient consideration by the state for the powers conferred, and with which this court, as the case is now presented, cannot interfere.

In the opinion of this court, the act in question is not in violation of either the state or Federal Constitutions, and the judgment of the court below is affirmed.

Judge LINDSAY not sitting.

Supreme Court of New York. Second District.

PLATT, RECEIVER, *v.* BENTLEY.

A depositor in a national bank which has failed and passed into the hands of a receiver, may set off the amount of his deposit against his debt to the bank on a note.

THE plaintiff as Receiver took possession of the Farmers' and Citizens' National Bank, September 5th 1867. The defendant then had on deposit in the bank to his credit $571.27. The bank then held the defendant's note for $800, to become due on the 5th day of November 1867. The defendant paid the difference between the amount of the deposit and the note and interest, and for the rest claimed to offset the deposit in full as against the

equal balance of the note. The bank being insolvent, plaintiff as receiver brought suit on the note and claimed that the defendant should pay his note in full, and accept such dividends as the assets of the bank might *apportion* on the amount of the deposit.

Theo. F. Jackson, for plaintiff.

J. M. Stearns and *Homer A. Nelson*, for defendant.

The opinion of the court was delivered by

J. F. BARNARD, J.—It was the settled law in this state, even before our statute was passed, that a receiver of a bank takes the assets subject to subsisting rights between the bank and its customers, and that set-offs and counter-claims became operative to the same extent as if the bank was solvent and continuing business. Now it is made statute law. If the plaintiff were the receiver of a state bank, there would be no question, but that the defendant should be allowed his deposit upon his note. I see nothing in the currency acts which introduce any new principle. The receiver, it is true, is to collect all the debts and pay over proceeds to U. S. Treasurer. But what is a debt? A customer of a bank having a note about to mature makes provision to meet and pay it by depositing in the bank having his note, the amount or part of the amount to be paid. It seems to me that the only debt the receiver takes is the balance between the note and deposit. Judgment of the Special Term reversed and new trial granted.

United States Court of Claims.

BROWN v. THE UNITED STATES.

In the adjudication of cases under the Captured or Abandoned Property Act, the Court of Claims is a Court, not a mere commission, and has jurisdiction to render judgment against the United States for specific amounts which cannot be reviewed by the executive officers of the government.

A claimant under the above-named Act, obtained a decree of the Court of Claims in his favor for a certain sum, afterwards the Secretary of the Treasury reduced the amount and paying part, refused to pay the balance—whereupon claimant brought suit against the United States for the balance: *Held*, that he might recover.

Actions against the government and public officers, discussed by NOTT, J.

NOTT, J., delivered the opinion of the court:—This is an action brought, upon a former decree of this court, to recover $723.32, a balance remaining unpaid and unsatisfied.

The former decree was rendered on the 13th April 1868, wherein, among other things, it was adjudged that the captured property of the claimants "was sold in the manner provided by law, and the proceeds of the said sale, after deducting all lawful expenses attending the disposition of the same, were paid over into the Treasury of the United States, where the same now remains, amounting to the sum of $9904.44." A report from the late Secretary of the Treasury to this court, made in the present case, shows that the former decree was not wholly satisfied, and affords only this explanation of the deduction made at the Treasury:

"That, after a thorough and faithful examination into the accounts and statements of the agents of this Department who were engaged in the collection, transportation, and sale of the said fifty two (52) bales of cotton, it was ascertained that the sum of nine thousand one hundred and eighty-one dollars and twelve cents ($9181.12) was the residue of the proceeds of the sale of the fifty-two (52) bales of cotton aforesaid, after deducting 'the expense of transportation and sale of said property, and the other lawful expenses attending the disposition thereof,' and no more; therefore, the said sum of $9181.12 was paid in satisfaction of the judgment of the court for $9904 44."

As the amount of the net proceeds in the Treasury had been one of the issues joined in the former suit, and as the court passed upon it, finding and adjudging, on the evidence, the precise amount due to the claimants, it is apparent that the Secretary did not acquiesce in the finality of the judgment, but, on the contrary, sought to revise it, and himself decide what were the "lawful expenses attending the disposition" of the captured property.

This attempt of an executive officer to constitute himself a supreme judicial tribunal which might annul the judgments of a court confessedly clothed with jurisdiction of the subject-matter, must be deemed extraordinary, though there were at the time some circumstances which palliate, if they do not justify the action of the late Secretary.

Subsequently, the precise position assumed by the Secretary of the Treasury was brought before the Supreme Court by the appeal in the *Case of Nelson Anderson*, 9 Wall. 58, and presented in the following proposition: "That the Court of Claims had no authority to render judgment for a specific sum, the power of the court being limited to the point of deciding whether the claimant was entitled to recover at all, leaving the amount to be determined by computation by the proper officers of the Treasury Department." The Supreme Court made very short work with the proposition, and disposed of it in a single sentence. "To sustain this position," says Mr. Justice DAVIS, who delivered the opinion of the court, "would require us to hold that for this class of cases Congress intended to constitute the Court of Claims a mere commission. The court will not attribute to Congress a purpose that would lead to such a result, in the absence of an express declaration to that effect."

The position of the late secretary, therefore, was utterly untenable, and his action in depriving a citizen of property which had been lawfully adjudged to be his by a tribunal having jurisdiction both of the parties and the action, was a dangerous exercise of official power which the law will neither authorize nor leave unredressed.

It is objected on the part of the defendants that this court has no jurisdiction of this action; that the judgments in these causes are pay-

able out of the "abandoned or captured property fund," and out of that only; and that the whole power of this court in regard to that fund is exhausted when it has once passed upon the question of the claimant's rights. On the part of the claimant, it is replied that this action is not brought under the "Abandoned or Captured Property Act," but under the statute creating the court, and conferring upon it jurisdiction of all claims founded upon any contract, express or implied (Act 24th February 1855, 10 Stat. L., p. 612); and that the action of debt, when brought upon a judgment, is an action founded upon a contract, 3 Blks. 160. The broad question has also been argued whether in this court a claimant may procure a judgment against the government, and then bring his action upon it, giving it in evidence as conclusive, incontestable proof of the defendant's indebtedness, and recovering upon it, as he might against an ordinary defendant in courts of the common law.

The answer does not meet the objections nor reach the real merits of the case. The claimant's former suit was not an action at law, brought to recover damages, but a suit in equity, prosecuted by the beneficiary of a trust against his trustee for the execution of the trust, and seeking to recover merely the party's own property, consisting of the specific proceeds of a specific thing. That such was the nature of a suit under the "Abandoned or Captured Property Act," has been in effect held by this court (*Woodruff's Case*, 4 C. Claims R. 486; *Bernheimer's Case*, 5 Id. 549); but the Supreme Court has given expressly to the statute the same construction. "Congress," says Mr. Justice DAVIS, in *Nelson Anderson's Case, supra*, "constituted the government a trustee for so much of this property as belonged to the faithful Southern people; and while directing that all of it should be sold and its proceeds paid into the Treasury, gave to this class of persons an opportunity, at any time within two years after the suppression of the rebellion, to bring their suit in the Court of Claims, and establish their right to the proceeds of that portion of it which they owned." Again, the Supreme Court has said yet more clearly: "The government is a trustee, holding the proceeds of the petitioner's property for his benefit; and having been fully reimbursed for all expenses incurred in that character, loses nothing by the judgment, which simply awards to the petitioner what is his own:" *Padelford's Case*, 9 Wall. 543.

Out of this trust fund it was undoubtedly the defendants' right to have the judgment discharged. Moreover, the government is not liable for the mistake, neglect, or misfeasance of its officers. Why, then, should the defendants be called upon to pay the portion withheld by the late Secretary out of their own funds—out of moneys raised by taxation and appropriated to the payment of debts contracted by the nation?

If the inquiry were to stop at this shallow depth, and if it were the duty of a court to deny a plaintiff justice on any pretext that its ingenuity may dress in plausible guise, we might very speedily be rid of this case. But, as was repeated by Lord MANSFIELD, in *Rees* v. *Abbot*, Cowp. 832, "Judges should be astute in furtherance of right, and the means of recovering it." Here it is most certainly right that the claimants should be paid the money which the proper tribunal, after a full hearing, has solemnly adjudged to be theirs—a judgment in effect affirmed by the highest tribunal of our judicial polity; and whatever

astuteness the judges of this court may possess, should be given to seeking "the means of recovering it."

Of "the means of recovering it" under the former judgment, I observe—

First, that the party could have no execution. An execution at law is a writ issuing out of a court directed to an officer thereof, and running against the body or goods of a party. In equity cases the decree often takes the place of a writ, but it contains the same ingredients it is directed to an officer of the court; it commands; it runs against the property or person of a party to the suit. In these cases there is nothing that bears the likeness of a writ of execution or contains any of its ingredients. The court issues no command; nothing runs against the property of the defendants; the Secretary of the Treasury is not an officer of the court. The "Abandoned or Captured Property Act" merely provides that the claimant shall "receive" the residue of the proceeds after the deduction of certain expenses; or, in other words, establishes a rule for the measure of damages: the act reconstituting this court, that its "final judgments" "shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment:" Act 3d March 1863, 12 Stat. L., p. 760, § 7.

Observe, now, that the language of the statute is explicit and exclusive. A copy of the "judgment" cannot be construed to mean a writ of execution; "on presentation" to the Secretary by the claimant, will not bear the interpretation of being issued to the Secretary by the court. Moreover, when a writ of execution issues, a party may have an *alias* and a *pluries* if the first be returned unsatisfied; or he may rule the sheriff to return it; or sue him for not satisfying it out of the defendant's goods; and the court never loses its control over the writ, nor its authority over the officer.

Secondly. It is thought by some of the court that the claimants have their personal action against the late Secretary. In cases where a public officer has been guilty of aggressive acts, without authority of law, against the person of an individual, as in *Mostyn* v. *Fabrigas*, Cowp. 150, or against the rights of private property, as in *Harmony* v. *Mitchell*, 13 How. 115, courts have regarded him as going beyond the bounds of his office, and not being shielded by the *colore officii* he might throw around his tortious act. But here there was no trespass upon the claimants' property nor assault against their person. An officer acting on the behalf of the government, which for the time being he represented, simply refused to relinquish the property which he held, or pay over the money of which he was the custodian. There was no actual malice, no constructive trespass; the act was strictly negative—refusing to execute and obey the law.

In our own country there has grown up such a belief in the divine right of public officers so nearly resembling all that was ever believed of the divine right of kings, that it is vain to look for more than one personal action brought against a high officer of state—*Stokes* v. *Kendall*, 14 Peters. In England the highest have never been deemed higher than the law; and to the English courts we may turn with profit to learn to what extent great public functionaries are amenable in courts of justice at the suit of injured citizens.

There is the old case in Cowper, where the Governor of Minorca illegally imprisoned and banished a citizen. It was in 1771—a hundred years ago; but an English jury soon after cast him in £3000 damages, and the Court of King's Bench with MANSFIELD at its head, sustained the verdict: *Mostyn* v. *Fabrigas*, Cowp. 150. So the divine right of governors was disposed of, even as against a poor Minorcan, only by treaty made a subject of Great Britain.

There is a later case against another governor—the Governor of Gibraltar, 1841—*Glynn* v. *Houston*, 2 M. & G. 337. He sent a company of soldiers to search for a Spanish general secreted in a certain house. An English merchant, in an adjoining house, coming to his own door, was stopped by a sentry's bayonet, and compelled to remain within till the search was over. The merchant brought his action. For this constructive assault of the governor, by the sentry, and this imaginary invasion of an Englishman's castle by compelling the owner to remain within it for a few moments, an English jury fined the Governor £50. On a motion for a new trial all the judges of the Common Pleas held that the action would lie, and that the verdict should stand. Wherefore the divine right of governors to do unlawful acts may now be considered in Great Britain as entirely at an end.

There is the case of *Buron* v. *Denman*, 2 Exch. 167, a leading case upon another point of law, where a captain in the royal navy was sued, the damages being laid at £100,000, for destroying the slave barracoons of a foreigner on the coast of Africa. All of the barons of the Exchequer held the act was unlawful and the officer liable, but justified by the subsequent ratification of his government. Lord WENSLEYDALE, then Mr. Baron PARKE, doubted whether the maxim, *omnis ratihabitio retrotrahitur et mandato equiparatur*, should apply; that is, whether ratification by the government itself could make that lawful subsequently which was unlawful at the time the thing was done. But the distinctive principle of this case—much misunderstood at home and abroad—has been pointed out by the Queen's Bench in an opinion from which I shall presently quote.

To go back, there is a case in Chancery before Lord ELDON in 1816, the case of *Walker* v. *Congreve*, 1 Carp. Pat. Cas. 356, where an officer of the government of some distinction, Sir William Congreve, acting under orders from the Ordnance Office, saw fit to violate an injunction restraining him from manufacturing a patented article. The Lord Chancellor said with great frankness, and with great firmness, "There has been an *ex parte* injunction granted in this case, and I think I ought not to have granted it before hearing the other side. Had I read the bill and affidavit with strict attention, I think I should not have granted the injunction. I would wish to speak with all respect that I ought of Sir William Congreve in his official and individual character, but I must tell him what I would tell any other man who is brought as a suitor into this court, that he must not disobey its orders. He might have moved to dissolve the injunction, but he could claim no right to infringe it." "Speaking with all respect, I will treat government here as I would any suitor of the court. Let an account be kept of all machines made in alleged violation of the plaintiff's patent, subject to the profits to which the plaintiff will be entitled if the patent has been infringed. I thus secure to Mr. W[illiam]er all that he can wish,

or all that he is entitled to obtain. In the mean time let the injunction be dissolved, and let the defendant proceed in supplying the demands of the public service, subject only to account at the instance of the plaintiff on the trial of the legal issue. I would recommend to government to pay the costs of the present application, as there are grounds for believing the injunction violated. I can only recommend the government, but I would have it understood, that if the recommendation is not attended to, I will make an order for the defendant, Sir William Congreve, to pay them."

There was a case before the Privy Council in 1860, an appeal from the Supreme Court of Calcutta, in an action brought against a public officer for a wrongful act officially done. In an opinion prepared by Sir JOHN TAYLOR COLERIDGE and read by Dr. LUSHINGTON, an opinion much quoted and approved by the other English courts, it is said: "If the act which he (the defendant) did was in itself wrongful as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice if its agents were not personally responsible for them; in such cases the government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration:" *Rogers* v. *Dutt*, 13 Moore's P. C. R. 236.

There was, in 1842, a notable case before the House of Lords, *Ferguson* v. *Earl of Kinnoul*, 9 Clarke & Fin. 251, where a personal action had been brought against the members of a presbytery of the established church of Scotland. The case comes pretty close to the present one, if it be not identical with it, in this, that the rights of the party had been the subject of judicial decision (p. 278). It was held with unanimity that "if the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures," and that "persons having judicial functions, but being also required to perform ministerial acts, may be sued for damages occasioned by their neglect or refusal to perform such ministerial acts."

The decision is illumined with the concurring opinions of LYNDHURST, and BROUGHAM, and COTTENHAM, and CAMPBELL. Our own Supreme Court has considered the case, and construed it to decide this: "That the refusal to obey the lawful decree of a court of justice was a wrong, for which the party who had sustained injury by it might maintain an action and recover damages against the wrongdoer:" *Kendall* v. *Stokes*, 3 How. 98.

But these, it may be said, were not actions against high officers of state. However, in 1862, an action was brought "against the Secretary of State for the Home Department, for not submitting to her Majesty a petition of right presented by the plaintiff under 'Bovill's Petition of Right Act,' whereby he was prevented from having the same prosecuted:" *Irwin* v. *Gray*, 3 Fost. & Fin. 635. And the plaintiff actually called the Secretary, Sir George Gray, as a witness, who came into court, and testified "that he had submitted the petition to her Majesty, and that

he had not advised her to grant her fiat." Upon this all the judges of the Common Pleas thought "the case was at an end;" "it was enough that the Secretary of State had submitted the petition to her Majesty;" "it was clearly the duty of the Secretary of State to examine the petition of right, and to give his advice upon it whether a cause of action against the Crown arose;" but none of them seems to have doubted that if the Secretary of State had neglected his duty and done nothing, he would have been amenable at law for his negligence.

More remarkable is the case in the Queen's Bench in 1863, of Lieutenant-Colonel Dickson against The Secretary for War, the lord lieutenant commanding a military district, and his own colonel, Id. 527, "for causing, by means of false charges, the removal of the plaintiff from the office of lieutenant-colonel of the regiment." All of these officers were called as witnesses. In the course of the trial, and while the Secretary for War was in the witness-box, Lord Chief Justice COCKBURN put this question to him:—

"Was there any personal influence used, or sought to be used, upon you, to make you depart from the ordinary course?" and it appearing that there had been none, the Lord Chief Justice thus put the case to the jury: "I shall tell the jury that if they believe that his intention was to oppress and injure the plaintiff, he is liable; but that if he made the recommendation to dismiss him out of an honest sense of duty, even though he may have been mistaken, he is not liable in law."

But the highest declaration of this principle came from the same judge in 1865, when delivering the opinion of the Queen's Bench in *Feather* v. *The Queen*, 6 B. & S. 257. "Let it not, however, be supposed," he says, "that a subject sustaining a legal wrong at the hands of a minister of the crown, is without a remedy. As the sovereign cannot authorize wrong to be done, the authority of the crown would afford no defence to an action brought for an illegal act committed by an officer of the crown. The learned counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of state for an injury done by the authority of the crown, but he altogether failed to make good that position. The case of *Buron* v. *Denman*, 2 Exch. 167, which he cited in support of it, only shows that where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by a British subject, and the act is adopted by the government of this country, it becomes the act of the state, and the private right of action becomes merged in the international question which arises between our government and that of the foreigner. The decision leaves the question as to the right of action between subject and subject wholly untouched. On the other hand, the case of the general warrants, *Money* v. *Leach*, 1 T. R. 493, and the cases of *Sutton* v. *Johnson*, 3 Burr. 1742, and *Sutherland* v. *Murry*, 1 T. R. 598, there cited, are direct authorities that an action will lie for a tortious act, notwithstanding it may have had the sanction of the highest authority in the state. But, in our opinion, no authority is needed to establish that a servant of the crown is responsible in law for a tortious act done to a fellow-subject, though done by the authority of the crown—a position which appears to us to rest upon principles which are too well settled to admit of question, and which are alike essential to uphold the dignity

of the crown on the one hand and the rights and liberties of the subject on the other."

Therefore it appears, by the concurrent opinions of all the judges of the six great courts of Great Britain—the Exchequer, the Common Pleas, the Queen's Bench, Chancery, the Privy Council, and the House of Lords—that it is a fundamental principle that every British subject who has suffered a legal wrong shall have legal redress against some one —a lofty ground to be maintained, but the only ground to stand upon if vested rights are to be secure or laws are to prevail over men.

But it is proper to note here that while the English courts have held the highest officers of the state to the strictest accountability at law in cases where the act complained of was tortious or unlawful, they have not sustained an action where the officer, being invested with a discretion, did, within the proper jurisdiction of his office, erroneously exercise it. The case where such an action has been most seriously considered is that of *Gidley* v. *Lord Palmerston*, 3 B. & B. 275.

There the Secretary of War had received a fund, to be paid and distributed to certain persons. In the exercise of his official discretion, he had refused to pay to the plaintiff. The plaintiff brought his action, and it was held by Lord Chief Justice DALLAS, after a review of the English cases, "that on principles of public policy an action will not lie against persons acting in a public character and situation which, from their very nature, would expose them to an infinite multiplicity of actions—that is, to actions at the instance of any person who might suppose himself aggrieved. And though it is to be presumed," he adds, "that actions improperly brought would fail, and it may be said that actions properly brought should succeed, yet the very liability to an unlimited multiplicity of suits would, in all probability, prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself."

There is a distinction taken by English lawyers between ordinary claims upon the Treasury and the judgments of their courts. "Where money," says Manning, in his Excheq. Prac., p. 85, "is recovered against the crown, the writ of execution for the subject is directed to the treasurer and chamberlain, who appear to be personally responsible to the plaintiff if they do not appropriate the first moneys that come to their hands toward satisfying his demand." I cannot, however, find, on the one hand, that the point has been actually decided; nor, on the other, that any officer of the English government has ever undertaken to revise the decisions of their courts of law, nor destroy the solemnly adjudged rights of a subject of Great Britain.

But though our individual opinions may be that an action at law will lie against the Secretary of the Treasury, we cannot well decide the point in a collateral suit; nor does it follow that, as a remedy, it would be exclusive or adequate. As was said by the Supreme Court, where the head of another executive department had set himself the task of reducing the award of an arbitrator, "it is seldom that a private action at law will afford an adequate remedy:" *Kendall* v. *United States*, 12 Peters 614.

Thirdly. It remains to inquire whether a proceeding by *mandamus* would lie against the Secretary of the Treasury.

Such a power may be vested in the Court of Claims by the broad

language of the act reconstituting it, to "generally exercise such powers as are necessary to carry out the powers herein granted to it." The power, undisputed, to decree the payment of money from the Treasury, may necessarily involve the power "to carry out" the decree; for where a statute imposes upon a public officer an official duty, and provides no specific legal remedy for non-performance, there will be granted *ex debito justitiæ* a *mandamus*. Such a power we know, since the case of *Marbury* v. *Madison*, 1 Cranch 137, is not a part of the original jurisdiction of the Supreme Court; and, since the case of *McIntire* v. *Wood*, 7 Id. 504, is not intrusted to the Circuit and District Courts of the United States; but nevertheless is vested, as has been held, in the courts of the District of Columbia.

There are two decisions of the Supreme Court relating to *mandamus*, indicative of two classes of cases. In the first, *Kendall, Postmaster-General*, v. *The United States*, 12 Peters 527, it was held that the Postmaster-General could be compelled, by *mandamus*, "to credit the relators with the full amount of the award;" because this was "a precise, definite act, purely ministerial, and about which the Postmaster-General had no discretion whatever." In the second, *Decatur* v. *Paulding*, 14 Peters 497, it was held that the Secretary of the Navy could not be compelled to pay a pension under an Act of Congress, because the construction of the statute was an executive and not a mere ministerial act, and "where the law authorized him to exercise discretion or judgment," the court could not revise his judgment, or interfere with his discretion. The first of these decisions has been neither repeated nor overruled, but it has been questioned on the same bench (Mr. Justice CATRON, 14 Peters 520); the second has grown into a class of cases: *Brashear* v. *Mason*, 6 How. 92; *Reeside* v. *Walker*, 11 Id 272; *United States* v. *Guthrie*, 17 Id. 284; *United States* v. *The Commissioner Land Office*, 5 Wall. 563; *Gaines* v. *Thompson*, 7 Id. 347; *The Secretary* v. *McGarrahan*, 9 Id. 298.

Mandamus is a legal remedy for a legal right, granted where there is no specific legal remedy, and to prevent that defect of legal justice which would otherwise ensue. Existing anterior to the courts of equity, it partakes of the discretionary, flexible, and coercive remedies of equity jurisprudence, and is, I apprehend, termed "legal" chiefly because the single tribunal intrusted with the power in England is a court of law. Originating in the actual presence of the King in the early days of the Court of King's Bench, and his desire to see justice done by his officers, it has been retained by that court, and applied upon the theory of being the King's own act. Hence the restrictive rule that it cannot be granted against the crown, or the ministers of the crown, that the King cannot command himself. Yet it has been held to lie against the Lords of the Treasury where they were charged by statute with the payment of a pension, and a specific appropriation in their hands was made for that purpose: *Smyth's Case*, 5 Nev. & Man. 589; 6 Id. 508.

But this rule of the English law has occasioned doubts as to whether *mandamus* will lie against the secretaries of our executive departments. First among our American cases is that of *Marbury* v. *Madison*, 1 Cranch 137, which determined that this power is not included in the original jurisdiction of the Supreme Court. But the well-known opinion of the Chief Justice examines the question of liability, and holds, 1st, that the

President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his conscience; and, 2d, that where the members of his cabinet "aid him in the performance of these duties," acting directly or constructively in conformity with his orders, "their acts are his acts, and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion;" but, 3d, "when the legislature proceeds to impose on such an officer other duties, when he is directed peremptorily to perform certain acts, when the rights of individuals are dependent on the performance of those acts, he is, so far, the officer of the law; is amenable to the laws for his conduct;" and "the individual who considers himself injured has a right to resort to the laws of his country for a remedy." "Is it to be contended," exclaims the Chief Justice, "that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandates?" The decision is higher in tone and bolder in terms than any that has come after it; nay, some of the cases which it puts illustratively have since been held to be beyond the aid of judicial power.

Thirty-five years later came the case of *Kendall* v. *Stokes*, 12 Peters 524. An Act of Congress had authorized an arbitration, and directed the Postmaster-General to credit the contractor with the amount of the award. The Postmaster-General refused, and the Circuit Court, in the District of Columbia, had the courage to issue against this high executive officer a peremptory *mandamus*. The act was sustained, on appeal, but by a divided court. The opinion was delivered by Mr. Justice THOMPSON affirming the power, where the thing to be done is but ministerial, involving no exercise of discretion. With him were STORY, MCLEAN, BALDWIN, WAYNE and MCKINLEY. Dissenting were the Chief Justice, BARBOUR and CATRON.

Only two years later came the case of *Decatur* v. *Paulding*, 14 Peters 497. A Secretary of the Navy had refused to place on the pension list the widow of one of the most distinguished of our earlier naval officers, and the court below had considered the case, and refused a mandamus on the merits. The Chief Justice and a majority of the judges held that the construction of a statute by a secretary was an executive act, involving the exercise of discretion, and that the Circuit Court was without jurisdiction. BALDWIN, J., took the distinction between jurisdiction and the proper exercise of jurisdiction. CATRON, J., held that the Circuit Court had no jurisdiction in any case, and he attacked the previous decision of *Kendall* v. *Stokes*. Into this case came the terms "executive" and "ministerial," and while the great authority of *Marbury* v. *Madison* was not denied, and the express decision of *Kendall* v. *Stokes* was not overruled, the boundaries within which the writ might run were reduced to the narrowest possible limits.

It may be noted here that the Supreme Court has of late considered anew these terms "executive" and "ministerial," and has defined "a ministerial duty, the performance of which may in proper cases be required of an executive department," to be "one in respect to which nothing is left to discretion," "a simple, definite duty arising under conditions admitted or proved to exist, and imposed by law:" *State of Mississippi* v.

Johnson, 4 Wall. 498. A definition which has subsequently been reiterated by the same court: *Gaines* v. *Thompson*, 7 Id. 353.

The next case was likewise against a Secretary of the Navy, and likewise involved on his part the construction of a statute: *Brashear* v. *Mason*, 6 How. 92. Mr. Justice NELSON, who delivered the opinion of the court, distinguished it from *Kendall's Case*, and rested it on *Decatur's*, and it may be noted that there was no dissent.

In *Reeside* v. *Walker*, 11 How. 272, the opinion of Mr. Justice WOODBURY held that, if *mandamus* will lie to compel the payment of money from the Treasury, it must be where the government is liable, and where an officer refuses to pay over money appropriated by Congress. In that case the court held the gist of the petition failed; there was no judgment to be paid, no appropriation from which to pay it. And again there was no division in the court.

Then came the case of *Goodrich* v. *Guthrie*, 17 How. 284, involving the construction of a statute and the constitutional power of the President to remove from office a territorial judge. The reporter of the Supreme Court has framed the syllabus of a point decided, and has entitled the first opinion delivered "the opinion of the court;" but in fact no point was determined, and no opinion of the court delivered. The opinion of Mr. Justice DANIEL, so entitled, was based on one of the maxims of the King's Bench, that there is no power in the court to command the withdrawal of money from the Treasury, and with him were the Chief Justice, WAYNE and CATRON. Mr. Justice CURTIS placed his concurrence in the judgment expressly upon the ground that *mandamus* is not a legal remedy to try the title to an office, and with him were NELSON, GRIER, and CAMPBELL. Mr. Justice MCLEAN dissented, and held that the *mandamus* should issue.

Recently, we have had the case of *Cox* v. *McGarrahan*, 9 Wall. 298, wherein the *Kendall Case* is spoken of as settling the jurisdiction of the former Circuit Court of the District, and wherein the present Supreme Court of the District is conceded to have succeeded to all its powers. The case was reversed on several grounds, and determines nothing which has not been determined repeatedly before.

In but two of these cases which have been carried by appeal to the Supreme Court, the first and last (*Kendall* and *Cox*), did a *mandamus* actually issue in the court below; in the first alone has the Supreme Court actually and positively affirmed the power of the court below to issue a *mandamus* against the head of an executive department; in none has the power to command the withdrawal of money from the Treasury been ruled or conceded.

Therefore, it cannot be said to these claimants that even the extraordinary remedy of the "high prerogative writ" of *mandamus* is within their reach, even though it be with us but a judicial remedy: *Kentucky* v. *Ohio*, 24 How. 66. Never a writ of right, its issuance founded on a separate judicial proceeding little less than a distinct action (*Kendall* v. *Stokes*, 3 How. 87), and the power to issue it clouded in our own country with a judicial uncertainty that runs through the entire history of the national judiciary, beginning with 1 Cranch and continuing to 9 Wallace, it assuredly is not a remedy which a court can pronounce in a collateral suit to be certain, effectual, and within the control of the party needing its aid. We must close this inquiry with the conclusion that

so far as the claimants' former suit is concerned, they are left without certain remedy; that the judgment of a court of competent jurisdiction, in effect affirmed by the highest tribunal in the land, has been annulled by the arbitrary and illegal act of a single executive officer; and that these citizens of the United States, with the courts of the United States declaring their legal right on the one hand, and their property actually in the Treasury of the United States on the other, will be left wholly without redress unless the present actions may be maintained. "The government of the United States," said Chief Justice MARSHALL, "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right."

The remedy which these claimants have selected is an action at law for the moneys withheld. The action establishes the fact that the property of a citizen, which, in the language of the Supreme Court, was "his own," has been taken by the government's chief financial officer. Under the Joint Resolution, 30th March 1868 (15 Stat. L., p. 251), this money, so taken, has been paid into the Treasury of the United States, and is there retained by the defendants to their own use. Like all private property, it was covered by the guarantee of the Constitution that it should not "be taken for public use without just compensation." Like most property so taken, it came within the scope of the statutes creating and organizing the Court of Claims, and should be deemed to have been accepted by the defendants upon the terms and conditions of an implied contract.

As the question of jurisdiction has been raised—always the question of greatest importance—and as, unfortunately, the court is divided upon it, I proceed to state the reasons which actuate the majority.

When the work of establishing the Court of Claims was before Congress, it appeared by the reports of their own committees that as long ago as in 1848, of 17,573 private claims which within ten years had been presented to Congress, 8948 had never even been in any way acted upon, and but 910 had passed both Houses. (Report by Hon J. N. Rockwell, from Committee of Claims, House Representatives, April 26th 1848, first session Thirtieth Cong., vol. 3, No. 498.) That such a number of American citizens should have been left by their own government without a hearing, and to that extent at least without redress, was of itself a great and grievous wrong. But while the great mass of creditors were left unheard, claims of doubtful character passed through Congress, some in forms which attracted attention, and others of which the country never heard, in the dubious disguise of *ex parte* arbitrations and awards.[1]

[1] Thus, the first case in the first volume of the reports of this court (*Gordon's Case*, 1 C. Cls. 1) discloses these extraordinary facts: There was allowed to the claimant for property destroyed by United States troops $8873; then $100 for an error of calculation in the first "award;" then $8997.94 for interest; then $10,004.89 for more interest; then $39,217.50 for property previously found not to have been destroyed by United States troops; and, finally, $66,519.85 on a "revision" of the previous awards. The Forty-first Congress revived this practice in the celebrated Chorpenning case, where the Postmaster-General, in an *ex parte* arbitration on *ex parte* testimony, awarded the claimant $425.000 It is not generally known that the same claim had been brought by the claimant previously before the Court of Claims, where he demanded but $176,576, and where the suit was dismissed.

Moreover, the vast number of claims pressing upon Congress had surrounded the national legislature with influences importunate, if not corrupt, and the passage of some doubtful claims of large amount had aroused public suspicion, and lowered the character of Congress in the public mind. About the same time, too, a seal was set upon the degradation of one of the Houses by the expulsion of three members for receiving bribes for the prosecution through Congress of private claims. The proceedings will be found in the Congressional Globe for the third session of the Thirty-fourth Congress, under the expressive title of "Corruption of Members of Congress." Finally, the public credit had suffered, and the government, like all irresponsible purchasers, was compelled to pay more in the market for what it bought than many of its own citizens, and the most prudent merchants and skilful manufacturers of the country refused to deal with it as a customer which held itself above all legal means of redress. To remedy these great mischiefs, the statesmanship of the day devised the Court of Claims. Coming before the Senate at first in the proposition to establish a board of commissioners for the investigation of claims, the bill was changed so as to establish a court for the avowed purpose of giving finality to its judgments. "I want," said a statesman of that day as distinguished as any (Stephen A. Douglas)—"I want an adjudication which I should deem binding upon us." The act establishing the court was as remedial a statute as any that Congress ever passed—to repress a mischief and to advance a remedy.

In the great arrogance of great ignorance, our popular orators and writers have impressed upon the public mind the belief that in this republic of ours private rights receive unequalled protection from the government; and some have actually pointed to the establishment of this court as a sublime spectacle to be seen nowhere else on earth. The action of a former Congress, however, in requiring (Act 27th July 1868, 15 Stat. L., p. 243) that aliens should not maintain certain suits here unless their own governments accord a corresponding right to citizens of the United States, has revealed the fact that the legal redress given to a citizen of the United States against the United States is less than he can have against almost any government in Christendom. The laws of other nations have been produced and proved in this court, and the mortifying fact is judicially established that the Government of the United States holds itself, of nearly all governments, the least amenable to the law.

First in this high civilization that protects the individual and assures his rights stands the great empire of the German states. "The state," says a lawyer, also distinguished as a writer, who was examined as a witness in this court, "represented in its pecuniary capacity as the representative of money and property affairs, is called the *fiscus*. For the purpose of maintaining suits against the government, the fiscus stands in the place of the government; for the purpose of compelling the payment of demands against the state, the fiscus is substituted for the state itself. I know of no restriction of the rights of the subjects of Prussia to maintain any suit against the fiscus; foreigners as well as subjects, any man, can sue the fiscus; the power to maintain a suit against the fiscus is a matter of absolute right. Suits in relation to state property, in which the fiscus is either plaintiff or defendant, are

treated and decided like suits among private parties, and all the consequences of defaults and executions takes place against the fiscus. The fiscus is brought into court by the service of summons and complaint upon the fiscal attorney. The fiscal attorney has to answer just like any other party and bring his proof. Judgments rendered against the fiscus may be satisfied and discharged in the usual way, by execution:" *Brown's Case*, 5 C. Cls. R., p. 271.

In Hanover and Bavaria the redress is substantially the same: *Muller's Case* (6 Id.) In the republic of Switzerland the "federal tribunal takes cognisance of suits between the Confederation on the one side and corporations or individuals on the other when these corporations or private citizens are complainants and the object of litigation is of the value of at least 3000 francs." Law 5th June 1849; *Lobsiger's Case*, 5 Id. 687. In Holland, the Netherlands, the Hanseatic Provinces, the free city of Hamburg, and probably in all countries which have inherited the perfected justice of the civil law, the government is in legal liability thus subject to the citizen. Even in France, under the late empire, there was a less circumscribed means of redress, a more certain judicial remedy, a more effective method of enforcing the judgment recovered, than has been given to the American citizen, notwithstanding the pledge of the Constitution. Of all the governments of Europe, it is believed that Russia alone does not hold the state amenable in matters of property to the law. Of all the countries whose laws have been examined in this court, Spain only resembles the United States in fettering the judicial proceedings of her courts by restrictions and leaving the execution of their decrees dependent upon the legislative will. Yet, even in Spain, we know historically, back in the time of Ferdinand and Isabella, that the son of Columbus "did not succeed to his father's dignities till he had obtained a judgment in his favor against the Crown from the Council of the Indias: an act," adds Prescott, "highly honorable to that tribunal, and showing that the independence of the courts of justice, the greatest bulwark of civil liberty, was well maintained under King Ferdinand." (Ferd. and Isabella, 3d vol., p. 245.) The records of this court also show that within the present century an American citizen recovered a judgment against Spain in a Spanish tribunal to the very large amount of $373,879.88, and that he elected to retain Spain as his debtor when the decree was about to be transferred to and assumed by the United States, and that his choice was judicious, for though thus transferred and assumed, the debt has never been paid: *Meade's Case*, 2 C. Cls. R. 225.

But the law to which we most frequently resort—the law upon which our whole system of rights and liberties is founded—the common law of England, is before us. Deeply graven upon it are the maxims that the King can do no wrong, and that the Crown is not answerable for the tortious acts of its servants. But did any court of England ever decline jurisdiction or deny justice under these maxims where a man's goods or property had been taken unlawfully for the use of the state, or where his money was actually unlawfully retained in the King's treasury?

Consider, first, all the modern reported cases, where the petition of right has been denied, and there are but five of them.

In the *Baron de Bode's Case*, 6 Dowl. Pr. R. 787, 8 Q. B. 208, 13 Q. B. 364, 3 Clarke H. L. Cases 469, the action was to recover out of

an appropriation by Parliament, which was to be disposed of by certain commissioners constituting a special tribunal. When the case was first heard at chambers it was complicated with various other questions, but as it passed through the Queen's Bench and Exchequer Chamber these supernumerary questions, together with much unnecessary reasoning, dropped off, so that when it came to be decided in the House of Lords, the decision was narrowed to this single point: "That the suppliant has no claim except under the statute and in the mode pointed out by its provisions."

The Lord Chief Baron who delivered the opinion does not, indeed, call the commission a tribunal, nor pronounce its awards judgments; but he does say that the Act of Parliament "meant to provide for the application of the whole fund, and leave no part to be dealt with except under its enactments. Any claimant, therefore, upon the fund must proceed according to the provisions of the statute, and has no other remedy."

In *Viscount Canterbury* v. *The Attorney-General*, 1 Phill. Chanc. 306, the action was for the negligence of the King's servants in causing, indirectly, a fire, which consumed the suppliant's property; that was the sole ground of the action, it being claimed that the sovereign was responsible for the consequences of their negligence.

In *Irwin* v. *Sir George Gray*, 3 Fost. & Fin. N. P. R. 635 (but see 16 Scott's C. B. R. 368, where the case is stated), "the suppliant sought compensation in 1861 for a series of alleged wrongs in the course of legal proceedings beginning in 1834." "The wrongs imputed were withholding from the juries certain letters; and the guilt of those wrongs was imputed to Mr. Littleton, Lord Morpeth, and Lord John Russell, secretaries for Ireland, and the attorney-general and the Crown solicitor, in Ireland at the time, respectively. The question to be tried would have been whether the wrongs were committed so as to damage the suppliant; that is, in effect, to try in 1861 whether some verdicts returned in 1834–'5 were right, and if not, whether her present Majesty should compensate Mr. Irwin for the damage sustained in paying costs, and in being imprisoned and fined, and also in being disinherited by his father by paying to him £100,000."

The fourth of these cases is *Tobin* v. *The Queen*, 16 C. B. N. S. 210. This is a very great case in the ability with which it is discussed, and the learning with which it is enlightened. It was argued by Sir Roundell Palmer, Attorney-General for the Crown, and Sir Hugh Cairns, for the suppliant. The decision was by the venerable Lord Chief Justice of the Common Pleas, then in his seventy-second year, and one of the ablest of his life. All previous learning relative to the petition of right is embodied in this case, and all that has been said upon the subject since is taken from it. Yet the facts which called forth this great ability were simply these: "The commander of a Queen's ship employed in the suppression of the slave trade on the coast of Africa seized a schooner belonging to the suppliant, which he suspected of being engaged in slave traffic; and it being inconvenient to take her to a port for condemnation in a vice-admiralty court, caused her to be burnt." It was "Held that this was not a case for a petition of right; the remedy for the wrong, if any were done, being against the person who did it," upon the authority of *Madrazo* v. *Willes*, 3 B. & Ald. 353, "where the captain of a man-of-war destroying a Spanish ship wrongfully, but, as

he believed, in performance of his duty, was held to be liable to the Spanish owner to the amount of £20,000." And the principle of the case was the principle long before established, that "a petition of right will not lie to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty," nor "to recover unliquidated damages for a trespass."

Last of these rejected cases is that of *Feather* v. *The Queen*, 6 B. & S., Q. B. R. 257, 1865. The case turns upon a patent for an invention and the construction long put upon the Statute of Monopolies, and holds that "where there are no express words to take away from the Crown the right of using the invention," there letters patent will not preclude the Crown. The law as declared differs from American law in failing to recognise in the mind-work of the inventor an actual property.

Turn now to the instances in which the legal rights of a British subject to legal redress against the government are undisputed. "Replevin lies against the king," says the modern work of Manning, "if goods be in his hand," (Exch. Prac. p. 89). "A man," says the old work of Staundeforde, "shall have his petition for goods as well as for lands, as where the escheator seizeth goods of one who is outlawed, and hath accounted for them in the exchequer, and after the outlawry is reversed (Staund. Prærog., p. 72). In the Queen's Bench Lord DENMAN said: "There is nothing to secure the Crown against committing the same species of wrong—unconscious and involuntary wrong—in respect to money, which founds the subject's right to sue out his petition when committed, in respect to lands or specific chattels; and there is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such wrong:" *De Bode's Case*, 8 Q. B. 273.

So we have the remedy maintainable against the Crown, though the form of the action against a subject would be *ex delicto*, viz.: of replevin, as stated by Manning; of trover, in the case put by Staundeforde; of trespass on the case and ejectment, in the instances suggested by Lord DENMAN. "But," says the conclusive authority of Lord Chief Justice ERLE, in *Tobin* v. *The Queen*, p. 357, "whatever was the form of procedure, the substance seems always to have been the trial of the right of the subject as against the right of the Crown to property or an interest in property which had been seized for the Crown; and, if the subject succeeded, the judgment only enabled him to recover possession of that specified, or the value thereof, if it had been converted to the king's use." And that there may be no doubt as to the breadth and variety of the remedies given under the petition of right, I subjoin to this judgment of the Common Pleas the comment thereon of the Queen's Bench: "We concur with that court in thinking that the only cases in which the petition of right is open to the subject are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money; or where the claim arises out of a contract, or for goods supplied to the Crown for the public service:" *Feather* v. *The Queen*.

Admonished by the common law of England and by the jurisprudence of nearly the whole civilized world, we hold that this action of the claimants to recover of the government their own money unlawfully

withheld by its officers is a suit founded in justice and in right. We believe that it comports not with the honor and dignity of a republic to refuse to its citizens legal redress where their money or goods are in its hands more than with the honor and dignity of a king. The legislative power has committed to this court the duty of giving such redress in all cases where the claim is founded upon contract express or upon contract implied, or upon a law of Congress. The act is remedial, to remedy great mischiefs and to avoid many grievous wrongs. It deserves to be liberally construed, and so as to repress the mischief and advance the remedy. There is a certain modesty in courts declining doubtful jurisdiction which in ordinary cases is commendable and wise. But ordinary cases are those wherein the party may seek a certain jurisdiction elsewhere, and not cases where legal redress would utterly fail. In such, declining jurisdiction means denial of justice, and a decision which pronounces a citizen having a legal right absolutely without legal redress is a decision abhorrent to the common law. In such doubtful cases, doubts are to be resolved in favor of right and justice.

But in speaking of this case as doubtful let it not be understood that we entertain doubts. We so speak simply in deference to the opinions of our brethren whose conclusions differ from our own. This case we think distinguishable clearly from those which spring from the *tort* or *laches* of a public officer. It arises not from the wrongful act of the Secretary, but from the continuous withholding by the defendants of the money of the claimants. It is an action founded upon ratification—the strongest ratification known to the law, where the principal comes into court still holding that which his agent took. It belongs to a class where the law regards the principal as having done and still continuing to do that which the agent did.

Shortly before the reorganization of this court Parliament passed an act known as "The Petitions of Right Act of 1860," or popularly from its learned author, the present Chief Justice of the Common Pleas, as "Bovill's Act," 23 & 24 Vict. c. 34. By it the creditor of the Crown was reassured as to all the remedies of the common law for lands occupied, for goods withheld, for property taken and used, for contracts broken, and under it he may take defaults against the Crown and recover costs and seek relief either in courts of law or courts of equity. The narrower legislation of the United States has restricted the jurisdiction of this court to cases of contract, express or implied. Where goods taken unlawfully are still in the possession of the government, this court cannot right the American citizen, like the Court of Exchequer, by a writ of restitution, but it may give effect to the Constitution and hold that they were acquired by an implied contract.

The Court of Claims was established to give legal redress to the citizen as against the government, where he would have had legal redress as against another citizen. We cannot give legal redress except upon legal principles. We cannot sustain a defence on the part of the government, where if set up by an ordinary defendant it would be held illegal, inequitable, unconscionable. What would be said of a bank that came into court while still withholding the funds of a depositor and pleaded that the refusal to pay over was the tortious act of its cashier? What would be thought of a common carrier who, while retaining possession of my goods, pretended that the conversion was merely the wrongful act

of his agent? Such is the position of the government in this suit, withholding money that does not belong to it, insisting that the wrong was its agent's, though done on its behalf, and that the owner is without a remedy.

The government is not liable like the ordinary principal for the negligences and mistakes of its agents, and their authority is limited and defined by law, and the law is notice to all the world. But that defence cannot prevail where the government adopts and ratifies the mistake, or receives and accepts the benefit of the unauthorized act. Therefore it does not lie in the mouths of the defendants in this suit to say that their secretary's act was illegal, and that they are not responsible for unlawful acts; because their secretary acted in their name and strictly on their behalf, and they have retained the money which he withheld, and by a chain of acts and succession of officers have ratified all that he did. Nor can they now sustain the position that the law contemplated the payment of abandoned and captured property decrees solely out of the abandoned and captured property fund. That defence comes too late, for they had the opportunity of paying the decree out of that fund when they kept back a part and have had that opportunity ever since, and might have tendered payment when this suit was brought and have pleaded tender and been protected, if necessary, by the court in having the payment made out of the proper fund. On the contrary, the defendants have not sought through their officers to pay, but to evade payment. They occupy the position of a trustee, who having converted a part of a trust estate should set up in a proper action brought against him personally, that he should not be required to answer for the misappropriation out of his private funds. The defendants' agents have made this money of the claimants a part of the national indebtedness. To allow the money of a citizen to be kept in the public treasury without his fault or neglect, to sanction public officers through a mistake of law in taking private property against the legislative will, to permit unlawful acts to control the law, would be to annul the highest purpose of Congress in establishing this court.

The judgment of the court is that the claimants recover of the defendants the sum of $723.32.

The foregoing opinion has been some time before us, and we have hesitated in regard to its publication, on account of its great length. But its uncommon interest and ability induce us to believe, we could select nothing more acceptable to our readers. There has always seemed to be a kind of lameness in our national jurisprudence, in regard to the exercise of the power, ordinarily found in the prerogative writ of *mandamus*. While at common law, and in all the states, almost every defect of justice, when there is no other more specific remedy, is supplied by this writ, it so happens, that by the strict construction of the powers of the national judiciary, at first adopted, all the remedial powers of the several prerogative writs have been denied to those tribunals. This was done upon very plausible grounds, at first, that all the powers of the national government were of a statutory or constitutional character, and could not exist except in conformity with the written law; that all customary or constructive, and indeed all functions, depending upon a common law, must be treated as non-existent. This was no doubt prudent, at first, while in some sections so much jealousy

existed in regard to the centralizing tendency of the national authority. But it was not exactly the course to build up a dignified national power. And we predict that we shall now, that the national power has fairly vindicated its right to live, and develop itself, in the natural way, hear no more of this limping kind of construction, which began with *Marbury* v. *Madison*, 1 Cranch 127, and, with the single spasmodic revulsion of *Kendall* v. *Stokes*, 12 Peters 614, has continued to the present time, unless we except some of the very latest cases, where the tendency is perhaps less excessive.

From an early period in the jurisprudence of the country, both state and national, there seems to have been a process of refinement carried on, to a large extent by way of sharpened dialectics, in order, if possible, to exclude the plaintiff's case from obtaining the particular remedy sought. Sometimes this was done, as in pleas in abatement to the writ, by showing him that he had mistaken his remedy, and giving him a better one, and at other times, in dumb show, without ever deigning to show him whether he had any remedy, or not. This is a process of refining upon justice, or its remedies, that finds small countenance in the established maxims of the law, *Interest republicæ ut sit finis litium; Boni judicis est ampliare jurisdictionem.* It comes much nearer Dickens's definition of the "Circumlocution Office;" of learning "how not to do a thing." But it has some good effects. It sharpens the wits of the bar, and it exhibits the wisdom of the bench in a most enviable light! There was no question great need of this course in the early days of the republic in regard to the national courts, but since that is beginning to attain the manly stature, we trust we may hear less of these childish excuses for the denial of justice, through the short comings either of the law or its administrators.

But it affords us pleasure to be able to bear testimony to the manliness of the opinion in the principal case.

The learned judge, after showing very fully how much more effective redress is afforded by most of the European governments, than in our own country, in the enforcement of claims against the sovereign, not only by its subjects, but even by foreigners and aliens, comes to the discussion of the question how far the Court of Claims can give judgment, as upon an implied contract, against the United States, for moneys withheld by its secretary of the treasury; thus continues, in language worthy of all commendation:—

"The act [establishing the Court of Claims] is remedial, to remedy great mischiefs, and to avoid many grievous wrongs. It deserves to be liberally construed, and so as to repress the mischief and advance the remedy. There is a certain modesty in courts declining doubtful jurisdiction, which in ordinary cases is commendable and wise. But ordinary cases are those wherein the party may seek a certain jurisdiction elsewhere; not cases where legal redress would utterly fail. In such, declining jurisdiction means denial of justice; and a decision which pronounces a citizen, having a legal right, absolutely without legal redress, is a decision abhorrent to the common law. In such doubtful cases, doubts are to be resolved in favor of right and justice." We should say the same in all cases.

I. F. R.